

STATE OF MICHIGAN
COURT OF APPEALS

DONALD E. PINES,

Plaintiff-Appellee,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED

July 1, 2014

No. 314135

Wayne Circuit Court

LC No. 12-011577-CL

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ the trial court order granting in part and denying in part its motion for summary disposition, which was filed pursuant to MCR 2.116(C)(7) based on res judicata and collateral estoppel. Specifically, the trial court denied the motion with respect to plaintiff's claim that defendant violated the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* We reverse.

According to the opinion of the federal district court, on January 8, 2007, plaintiff began working for defendant as a part-time employee at defendant's department of psychiatry, and then he began working full time on November 26, 2007, as a senior billing clerk/patient account representative. On July 7, 2008, plaintiff met with Annmarie Lucas, who is the Director of Operations, and told her that another employee, Hilary McGraw, was stalking him and sexually harassing him. On July 16, 2008, an investigation² into the allegations was outlined and conducted by a human resources consultant, Patricia Whitfield, with the assistance from David Betts of defendant's office of Institutional Equity. During her interview, McGraw denied plaintiff's allegations, and also made allegations of inappropriate behavior by plaintiff. On September 15, 2008, plaintiff's supervisor, Tammy LaPrell, gave plaintiff a written warning for

¹ *Pines v Univ of Michigan*, unpublished order of the Court of Appeals, entered July 31, 2013 (Docket No. 314135).

² Betts interviewed plaintiff, McGraw and their coworkers. The coworkers corroborated some of McGraw's complaints against plaintiff and did not corroborate plaintiff's allegations against McGraw.

inappropriate and unacceptable behavior, and gave McGraw a verbal warning. On January 26, 2009, Betts issued a written final report finding that neither plaintiff nor McGraw violated defendant's sexual harassment policy, but finding that both plaintiff and McGraw acted unprofessionally.

Meanwhile, on July 28, 2008, plaintiff took a medical leave and provided a note from his treating physician, Dr. Murtaza Syed, which stated that plaintiff was under his psychiatric care and would not be able to work through August 11, 2008. Dr. Syed extended the medical leave several times, but finally released plaintiff to return to work on September 15, 2008. Dr. Syed added restrictions to plaintiff's return to work, stating that plaintiff needed a gradual return to his workplace. Defendant accommodated these restrictions by returning him on a part-time basis, at four hours per day beginning on September 15, 2008. Defendant also reduced plaintiff's workload and changed his office location in order to separate him from McGraw.

On his first day that plaintiff returned to work, he was given his written warning. Plaintiff was then absent several times, calling in sick on nine occasions between September 15 and November 3, 2008. On October 3, 2008, LaPrell addressed her concerns about plaintiff's absence from work. Plaintiff also experienced problems completing his assigned reduced workload, which was discovered by LaPrell in November 2008. As a result, defendant placed plaintiff on an unpaid medical leave, effective November 11, 2008, and stated the reasons in a memorandum written by LaPrell.

While plaintiff was out on medical leave, defendant eliminated plaintiff's position after it was determined that it was no longer needed. Defendant also created a new "reduced" position, which included some, but not all, of the job functions from the eliminated position. This position was filled in December 2008. Meanwhile, plaintiff's new treating physician, Dr. Ravi Kirbat, released plaintiff to return to work without restrictions, effective December 17, 2008, but plaintiff did not contact defendant about returning to work until March 16, 2009, when he emailed Whitfield in Human Resources stating that he learned that his previous position had been filled and asked for assistance securing a new position. After exchanging several emails, in April 2009, plaintiff submitted a grievance claiming that defendant violated (1) Michigan's Sexual Harassment law, (2) the Michigan Civil Rights Initiative, (3) the American with Disabilities Act, (4) Title VII of the Civil Rights Act of 1964, (5) the Whistleblowers Protection Act, (6) Marital Discrimination, and (7) defendant's Standard Practice Guide. Defendant's review committee found that plaintiff was not subjected to any unlawful actions, but agreed to extend plaintiff's medical leave to August 11, 2009, to allow additional time to find a new position. Although plaintiff applied for some positions, he was not selected for any of them. Defendant terminated plaintiff's employment, effective August 1, 2009.

On December 23, 2010, plaintiff filed a four-count complaint, in pro per, against defendant in the United States Court for the Eastern District of Michigan. Although he raised claims under the American With Disabilities Act (count I), Persons with Disabilities Civil Rights Act (count II), and the Elliott-Larsen Civil Rights Act (count IV), he subsequently agreed to dismissal of these claims without prejudice. In the remaining count (count III), defendant asserted that he was terminated in retaliation for complaining about a co-worker in violation of Title VII of the Civil Rights Act of 1964.

Defendant filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c), arguing that plaintiff could not establish a prima facie case because (1) some of plaintiff's alleged discriminatory employment actions did not constitute adverse employment actions, and (2) plaintiff could not show a causal connection between the protected activity and his termination, due to the fact that he complained about the alleged harassment in July 2008, but his termination did not occur until August 1, 2009. Defendant also argued that if plaintiff could establish a prima facie case of retaliation, it had a non-discriminatory reason for terminating his employment and plaintiff could not demonstrate the proffered reason was a mere pretext.

On February 6, 2012, the federal district court issued a 20-page memorandum and order granting the motion and dismissing the case. In agreeing with defendant on the first issue, the court wrote that the following actions did not constitute adverse employment actions:

First, while the September 15, 2008 written warning is disciplinary, it informs Pines that his behavior was inappropriate and unacceptable and does not impose significant corrective action. Second, the October 3, 2008 letter is not disciplinary at all. Rather, it informs Pines as to the effect of absences without documentation. Third, the October 29, 2008 memorandum advises Pines that there are concerns with his performance but does not impose any discipline on him as a result. Finally, the November 10, 2008 memorandum is not disciplinary. In that letter, the University informs Pines that because he was been unable to meet his work schedule obligations, he will be returned to medical leave. As noted above, Pines responded to that memorandum with a doctor's note indicating that he could not work at all.

Also, in agreeing with defendant's causal connection argument, the court ruled that plaintiff offered no evidence that any of his alleged disciplines or his terminations were the result of his sexual harassment complaint, and that even if plaintiff could establish temporal proximity, he had not pointed to any other indicia of retaliatory conduct. Finally, the court found that defendant stated a non-discriminatory reason for Pines' termination and rejected plaintiff's argument that a pretext was established because:

Pines' allegation concerning LaPrell does not show pretext because he offers no facts to show that LaPrell wanted him out of her department. Speculation does not establish pretext. Pines' allegation regarding the availability of his position also fails to show pretext. Pines has no evidence to rebut the University's contention that it could operate effectively with a lower position. Pines' allegation regarding bumping to another position also misses the mark. When Pines finally sought to return in March 2009, three months after his physician released him to do so, the University says that he was no longer entitled to the protections of the University's Standard Practice Guide (SPG) which apparently allows for bumping. Pines offers nothing to contradict this assertion. Overall, Pines has not shown that the University's actions with respect to him, up to and including his termination, were a pretext for retaliation.

On August 31 2012, plaintiff filed a two-count complaint against defendant in Wayne County Circuit Court. The first count asserted a claim of violation of the PWDCRA, and the second count asserted a claim of retaliation for making a sexual harassment charge under the

Elliott Larsen Civil Rights Act, MCL 37.2102. In relevant part, count one contained the following allegations:

10. In early July 2008 Plaintiff complained to his supervisors that he was being sexually harassed by a co-worker.

11. Thereafter, Defendant engaged in a pattern of harassment and discipline ultimately resulting in the plaintiff being placed on an unpaid medical leave on November 10, 2008.

12. Plaintiff attempted to return to defendant's employee about a dozen times after being placed on unpaid medical leave to positions that met plaintiff's skill set only to have the defendant not respond with either interviews or offers.

13. Defendant perceived and regarded the plaintiff to have a psychiatric disability.

14. The plaintiff had a history of psychiatric treatment that sufficiently limited one or more of life's essential duties.

15. Plaintiff has however completely recovered from any mental disability and has been cleared to return to work without restriction.

16. Defendant refused to rehire the plaintiff and ultimately released the plaintiff from all employment with the University of Michigan, including all appeals and grievances in September 2009.

17. As a direct and proximate result of said discrimination plaintiff has suffered damages, including but not limited to lost wages, lost benefits and emotional damages.

On October 2, 2012, defendant filed a motion to dismiss both claims based on res judicata and collateral estoppel. Defendant asserted that both counts relied on the same "factual nexus" as the federal lawsuit, being that he took medical leaves as a result of the harassment and that defendant subsequently retaliated against him by refusing to allow him to return to work, by denying him other positions matching his skill set, and by terminating his employment. Defendant argued that the doctrine of collateral estoppel (issue preclusion) prevents plaintiff from relitigating the facts and issues of his discrimination claim under the PWDCRA and both collateral estoppel and res judicata (claim preclusion) prevent plaintiff from relitigating his retaliation claim under the ELCRA.

On December 14, 2012, the circuit court conducted a hearing and issued a lengthy opinion dismissing the retaliation claim under the ELCRA and denying the motion with respect to the claim under PWDCRA. At the hearing, defendant's counsel argued that the facts are the same for both the federal and current lawsuit, and that there was a finding previously made that plaintiff could not show pretext, and that "if plaintiff cannot show pretext there, and this case is based on the same fact pattern, he can't show pretext here." Defendant's counsel further cited *Dobrowski v Jay Dee Contractors, Inc.*, unpublished per curiam opinion of the Court of Appeals,

issued January 26, 2010 (Docket No. 288206), to support his argument that “the inescapable conclusion is that plaintiff simply can’t relitigate that pretext issue.” Counsel explained that *Dobrowski* involved simultaneous lawsuits (a Family Medical Leave Act [FMLA] claim asserted in the federal court and a state law disability claim in the state court), and that the federal court dismissed the FMLA claim on the basis there was no pretext, and that the state court dismissed the state law disability claim on the basis of collateral estoppel because the issue decided in the federal claim was fatal to the state claim.

The trial court indicated that it would not grant the motion on the PWDCRA claim, remarking:

The problem, though, is that they are not the same cases, and their factual distinguishability where the, where there’s a question on whether those issues were, the disability issues, there’s a major question on whether any, whether some of the factors were addressed. And there’s no prior judgment on it.

In a fifteen-page opinion and order released on the same day, the trial court ruled that plaintiff’s PWDCRA claim was not barred by collateral estoppel because:

Although the same parties and privies . . . are involved in the instant action, the issues of whether or not Plaintiff had a disability and the ultimate fact of whether or not Defendant discriminated against Plaintiff on the basis of the alleged disability were never “actually litigated” in federal court and were never explored at all in the federal court. The claim was dismissed without prejudice and was not decided on the merits. Causes of action dismissed without prejudice cannot be deemed to have been actually litigated. See *Ranke v Automotive Moulding Co*, 226 Mich App 432; 573 NW2d 344 (1997) (The Court concluded that the trial court’s determination that plaintiffs had entered into a binding release barring their claims was a decision on the merits and that summary disposition should have been granted with prejudice). Thus, “[c]ollateral estoppel applies only when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained.” *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001). Therefore, collateral estoppel cannot be applied to Plaintiff’s disability claim because there was no prior judgment in which any fact or issue addressing disability discrimination was “clearly, definitively, and unequivocally ascertained.” *Id.* [Footnotes omitted.]

The trial court ruled that collateral estoppel applied to plaintiff’s claim of retaliation under the ELCRA due to plaintiff’s prior allegation of sexual harassment because the cause of action is identical to the cause of action under Title VII, 42 USC § 2000e-3(a), and then thoroughly reviewed the district court’s opinion and concluded that the issue of retaliation was actually and necessarily determined. The trial court also ruled that the claim of retaliation was also barred by res judicata. Thus, the trial court dismissed count II, but denied defendant’s motion with respect to count I.

Defendant argues that the trial court ignored the federal court’s prior determination that plaintiff could not show pretext on facts identical to those presented in plaintiff’s state court case. Defendant argues that collateral estoppel prevents plaintiff from relitigating the issues of a

legitimate business reason and pretext, and the trial court's failure to apply collateral estoppel to plaintiff's PWDCRA claim is clearly erroneous.

The application of a preclusion doctrine is a question of law that is reviewed de novo. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). We apply state law governing collateral estoppel to determine the conclusive effect of a judgment entered by a federal court on a subsequent action in state court. See *VanVorous v Burmeister*, 262 Mich App 467, 480; 687 NW2d 132 (2004). "Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Our Supreme Court has summarized the requirements of collateral estoppel as follows: "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). In Michigan, each alternate ground in a judgment is given conclusive effect for the purposes of collateral estoppel. *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transp Auth*, 437 Mich 441, 453; 473 NW2d 249 (1991).

In the federal lawsuit, plaintiff asserted a claim under Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against an employee who opposes any practice made an unlawful employment action under Title II. 42 USC § 2000e-3(a). As noted by the district court, in the absence of direct evidence, the retaliation claim is subject to the *McDonnell Douglas*³ framework. *Mickey v Zeidler Tool and Die Co*, 516 F3d 516, 523 (CA 6, 2008). Under this framework, the plaintiff must first establish a prima facie case, and once the plaintiff does, "the burden shifts to the defendant to articulate a nondiscriminatory reason for its actions." If the defendant articulates a nondiscriminatory reason, the plaintiff may then show that the defendant's reason "is merely a pretext for discrimination." "A plaintiff can demonstrate pretext by showing the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Id.* at 523, 526, quotation and citations omitted.

Citing federal cases,⁴ the district court set forth the elements of a prima facie case of retaliation as (1) plaintiff was engaged in a protected activity under Title VII; (2) defendant knew he was engaged in that protected activity; (3) defendant took an adverse, retaliatory employment action against him, and (4) there was a causal connection between the protected activity and the adverse employment action. The district court ultimately ruled that plaintiff failed to establish a prima facie case of retaliation because he could not prove a causal connection between his protected activity and his termination.

³ *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed2d 688 (1973).

⁴ *Randolph v Ohio Dept of Youth Serv*, 453 F3d 724, 736 (CA 6, 2006) and *Arendale v City of Memphis*, 519 F3d 587, 606 (CA 6, 2008).

In the state court lawsuit, plaintiff asserted a discrimination claim under the PWDCRA, which provides that an employer shall not “[d]ischarge or otherwise discriminate against an individual . . . because of a disability . . . that is unrelated to the individual’s ability to perform the duties of a particular job or position.” MCL 37.1202(1)(b). Generally, in order to establish a prima facie case of discrimination in violation of the PWDCRA, plaintiff is required to establish that (1) he is disabled as defined in the act, MCL 37.1103, (2) the disability is unrelated to his ability to perform his job duties, and (3) he has been discriminated against in one of the ways delineated in the statute. *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). Under a “perceived as disabled” claim, the plaintiff does not need to have a determinable physical or mental characteristic to establish a prima facie case. *Michalski v Reuven Bar-Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001). However, to prevail on a perceived disability claim, the plaintiff must prove: (1) he was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of his major life activities; and (3) the perceived characteristic was regarded as being unrelated either to his ability to perform the duties of a particular job or position or to his qualifications for employment or promotion. *Id.*

It is apparent that the prima facie elements for a claim under the PWDCRA are very different from the prima facie elements for a claim of relation under Title VII. The circuit court in this matter ruled that the issue of whether plaintiff had a disability was never litigated in the federal lawsuit and noted the disability claim was dismissed in the federal lawsuit without prejudice. While the circuit court is correct in this observation, the court overlooked the additional argument asserted by defendant, being that the federal district court addressed additional issues under the burden-shifting analysis of *McDonnell Douglas*, which applies to plaintiff’s PWDCRA claim. See *Bachman v Swan Harbour Ass’n*, 252 Mich App 400, 433 n 26; 653 NW2d 415 (2002). “If the plaintiff presents a prima facie case of purposeful discrimination [under the PWDCRA], the burden then shifts to the defendant to rebut such evidence,” *Peden*, 470 Mich at 205, or to articulate a legitimate business reason for discharge, *Aho v Dep’t of Corrections*, 263 Mich App 281, 289; 688 NW2d 104 (2004). If the defendant articulates a legitimate business reason for discharging the plaintiff, the burden shifts back to the plaintiff “to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge.” *Id.* at 289, quoting *Roulston v Tendercare (Michigan), Inc.*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

As quoted previously, the federal district court resolved both issues regarding legitimate business reason for discharge and pretext in defendant’s favor in granting summary judgment and dismissing plaintiff’s Title VII claim. Although these rulings were an alternate ground for granting summary judgment, as noted in *Dobrowski v Jay Dee Contractors, Inc.*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2010 (Docket No. 288206), this Court held that collateral estoppel extends to alternate grounds for a prior decision, and affirmed the trial court’s grant of summary disposition based on collateral estoppel.⁵

⁵ In *Dobrowski*, the trial court expressed disagreement with the federal court’s conclusion that the plaintiff could not adequately show that the legitimate business reasons the defendant

Admittedly, if plaintiff offered direct evidence of disability discrimination, then his state suit would not be precluded by the federal lawsuit. As noted in *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), the Sixth Circuit Court of Appeals has defined “direct evidence” as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” (citations omitted). Yet, it does not affirmatively appear from plaintiff’s complaint that his PWDCRA claim is based on direct evidence of discrimination. Cf. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 538-539; 620 NW2d 836 (2001) (the plaintiff testified at his deposition that, during the conversation where his employment was terminated, his supervisor stated that plaintiff was “getting too old for this shit”). Thus, we conclude that the circuit court erred in denying defendant’s motion for summary disposition.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. Jurisdiction is not retained.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

proffered for terminating the plaintiff’s employment was a mere pretext, but deferred to the ruling based on the doctrine of collateral estoppel. The federal court had also dismissed the FMLA claim on the ground that the plaintiff was not an eligible employer for purposes of the FMLA. Although unpublished decisions do not constitute binding precedent, they may be considered “instructive or persuasive.” MCR 7.215(C)(1); *People v Jamison*, 292 Mich App 440, 445; 807 NW2d 427 (2011).